Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SAM SUBLETT; JANET NAPOLITANO, ATTORNEY GENERAL,
PETITIONERS,

-VS-

SAMUEL W. SWOOPES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999), allow Arizona state prisoners to bypass routinely available discretionary Arizona Supreme Court review and submit their claims directly to federal court for habeas corpus review under 28 U.S.C. § 2254?

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OPINION BELOW

In *Swoopes v. Sublett*, 196 F.3d 1008 (1999), the United States Court of Appeals for the Ninth Circuit held that Arizona state prisoners need not seek discretionary review by the Arizona Supreme Court in order to exhaust state remedies for federal habeas purposes, even though discretionary review is available to "any party" under Rule 31.19, Arizona Rules of Criminal Procedure. According to the Ninth Circuit, this Court's opinion in *O'Sullivan v. Boerckel*, an Illinois case, "implicitly overruled" existing Ninth Circuit law requiring the exhaustion of discretionary review in Arizona. Thus, the court held, federal habeas claims for which Swoopes failed to seek discretionary review in state court are not barred by the federal exhaustion doctrine.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit in *Swoopes v. Sublett*, 196 F.3d 1008 (1999). The Ninth Circuit issued its order denying the State's timely petition for rehearing on December 17, 1999. Petitioners timely filed the petition for writ of certiorari within 90 days of that order. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

Rule 31.19 of the Arizona Rules of Criminal Procedure provides, in pertinent part:

> **a. Time for Filing; Cross-Petition.** Within 30 days after the filing of a decision [by the Court of Appeals] or within 15 days after the clerk has mailed notice of the determination of a motion for reconsideration, any party may file with the clerk of the Court of Appeals a petition for review by the Supreme Court.

Rule 111 of the Rules of the Arizona Supreme Court provides, in pertinent part:

(g) Depublication. [A]n opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

STATEMENT OF THE CASE

Swoopes and two accomplices robbed two men and a woman at gunpoint and raped the woman. All three victims unequivocally identified Swoopes as their assailant. When the Arizona Court of Appeals affirmed his convictions for burglary, armed robbery, kidnapping, and sexual assault, Swoopes filed, in 1987, a counseled petition for Arizona Supreme Court discretionary review of some of his claims, which was denied without comment. He then pursued federal habeas relief for those claims and for numerous additional claims that he had never presented to the Arizona Supreme Court for discretionary review. The district court held all but one of his federal claims precluded due to unexcused state-court procedural default. The Ninth Circuit affirmed, but this Court, in response to Swoopes' petition for a writ of certiorari, remanded the procedural preclusion issues to the Ninth Circuit for reconsideration in light of *O'Sullivan v. Boerckel*, which was decided during the pendency of Swoopes' federal habeas appeal.[1]

On remand, after further briefing by the parties, the Ninth Circuit panel decided that an Arizona state prisoner is not required to seek discretionary review by the Arizona Supreme Court in order to exhaust state remedies for federal habeas purposes, even though discretionary review is "at least facially" available. The Ninth Circuit denied without comment Petitioners' combined motion for rehearing and suggestion for rehearing *en banc*.

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1. Swoopes did not invoke *O'Sullivan* in his petition for writ of certiorari, nor did the State in its brief in opposition. This Court raised the issue *sua sponte*.

REASONS WHY THE WRIT SHOULD ISSUE

SUMMARY OF THE ARGUMENT

The recent *per curiam* opinion by a three-judge panel in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), held that, under *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999), the Arizona Supreme Court does not wish to exercise its discretionary appellate jurisdiction in non-capital criminal cases and, consequently, that Arizona state prisoners who seek federal habeas relief need not first exhaust that discretionary review, even though it is available to "any party" under Rule 31.19, Arizona Rules of Criminal Procedure. The *Swoopes* decision violates this Court's mandate in *O'Sullivan* that discretionary review, if available, must be exhausted.

This Court should grant certiorari for several reasons. First, this is a matter of great importance in § 2254 habeas litigation deriving from Arizona's courts. The erroneous *per curiam* decision, if allowed to stand, will adversely affect thousands of § 2254 habeas cases in the District of Arizona by ignoring, wholesale, procedural defaults at the very stage of review that this Court and federal circuit courts nationwide regard as dispositive for exhaustion purposes—the state's highest court. The Ninth Circuit's gross misperception of the so-called "philosophy" of *O'Sullivan*, extracted from mere dictum, results in a free pass around the exhaustion rule unlike anything in any other federal circuit: Arizona prisoners need not seek discretionary review *even though it is available to all and is a part of ordinary appellate procedure*. According to the Ninth Circuit's opinion, Arizona prisoners need not do what *O'Sullivan* expressly requires: exhaust available state remedies. 119 S. Ct. at 1733–34. The Ninth Circuit's decision violates *O'Sullivan* and, if allowed to stand, would substantially increase the volume of habeas litigation by requiring federal review of the merits of many more claims—claims that might otherwise have had the benefit of Arizona Supreme Court review.

Second, the Ninth Circuit's decision would regularly deprive the Arizona Supreme Court of the opportunity to review federal claims, because it effectively encourages Arizona prisoners not to bother filing petitions for discretionary review—the only source of the Arizona Supreme Court's appellate jurisdiction in non-capital criminal cases. The Ninth Circuit's shortcut-to-federal-court rule makes a mockery of the doctrine of comity, expressly championed in *O'Sullivan*—the federal courts' long-held

preference for allowing the state courts a *full* and fair first opportunity to pass on questions of federal constitutional law. 119 S. Ct. at 1732.

Third, the Ninth Circuit's decision has no factual support: never has the Arizona Supreme Court discouraged or prohibited timely petitions for discretionary review of meritorious claims. Indeed, every year it grants review of many such petitions, as shown by the statistics set forth in detail below. The imagined discouragement of meritorious petitions has no factual basis. Discretionary review by the Arizona Supreme Court is alive and well, is expressly available to "any party" under Rule 31.19(a), Arizona Rules of Criminal Procedure (promulgated by the Arizona Supreme Court), and is a commonly pursued, ordinary feature of appellate review in Arizona. Where discretionary review is available, as it is to "any party" in Arizona, state prisoners must seek it before they advance their claims to federal court. *O'Sullivan*, 119 S. Ct. at 1733–34.

Finally, the *O'Sullivan* dictum about Arizona case law is wrong, as explained in detail below. *O'Sullivan* concerned Illinois procedural law, not Arizona law, and in deciding that case this Court neither received nor solicited any input from Arizona.

Like Illinois, Arizona has a two-tiered system for non-capital criminal appeals, the second tier being the right to seek discretionary review by the state's highest court, either through counsel or *pro se*. Rule 31.19, Ariz. R. Crim. P.; *State v. Shattuck*, 684 P.2d 154, 156–58 (1984). The right of "any party" to seek discretionary review is expressly available under a rule promulgated by the Arizona Supreme Court and has been a much-used, regular feature of criminal appeals for many decades. Historical fact, statistics, and state law, although ignored by the Ninth Circuit, require the exhaustion of discretionary review in Arizona. *O'Sullivan v. Boerckel*, 119 S. Ct. at 1733–34.

ARGUMENT

A. THE ARIZONA SUPREME COURT REGULARLY EXERCISES ITS DISCRETIONARY APPELLATE JURISDICTION AND HAS NEVER EXPRESSED ANY "WISH" TO FOREGO IT.

In *O'Sullivan*, this Court held that, because discretionary review by Illinois' highest court is available as a part of ordinary appellate procedure, Illinois state prisoners must present their claims to that court in order to exhaust them for federal habeas purposes under 28 U.S.C. § 2254. In dictum, this Court erroneously cited the Arizona Supreme Court opinion in *State v. Sandon*, 777 P.2d 220 (1989), as an example of a state court that "d[oes] not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." 119 S. Ct. at 1733–34. That assertion, adopted by the *Swoopes* panel, is simply wrong as a matter of both fact and law.

Recently, the Arizona Court of Appeals, in an unrelated case, noted that *O'Sullivan* had mischaracterized Arizona law:

> While the Arizona Supreme Court may accept [*O'Sullivan v.*] *Boerckel*'s invitation to declare its discretionary review procedure as outside the standard review process, it has not yet done so.

(Appendix D: *State v. Stephens*, No. 1 CA–CR 97–0458–PR, unpublished order, dated August 2, 1999.) The Ninth Circuit's *Swoopes* decision has no factual support.

Moreover, the Ninth Circuit apparently based its decision on Justice Souter's lone concurrence rather than on the five-justice majority rule. Contrary to Justice Souter's view that state prisoners may "skip" a discretionary review procedure that is available to all, the *O'Sullivan* majority's holding expressly disallows such action. The *Swoopes* opinion attempts to modify *O'Sullivan* by adopting the very "philosophy" that the majority rejected.

1. The right to petition for discretionary review by Arizona's highest court is available to all criminal appellants, as a regular part of Arizona's appellate procedure.

Arizona Rule of Criminal Procedure 31.19(a) expressly makes discretionary review available to "any party" to a criminal appeal.

Historically, the Arizona Supreme Court has frequently granted review under Rule 31.19. In fact, in the past decade alone, the Arizona Supreme Court received 5,173 petitions for discretionary review in criminal cases. The court disposed of 4,837 by order, 155 by opinion, and 43 by memorandum decision. (See Table: Appendix E.)[2]

The statistics for 1986 through 1988 are not available in separate breakouts for criminal and civil. However, the proportions of disposition are consistent: of 2,336 petitions received during that time, 1,989 were disposed of by order and 228 by either opinion or memorandum decision. (See *id.*)

The reality is inescapable: the right to file a petition for discretionary review by the Arizona Supreme Court is available to any party in a criminal case under Rule 31.19, Arizona Rules of Criminal Procedure, and such petitions are filed by the hundreds every year, many resulting in Arizona Supreme Court decisions affirming, modifying, or overruling holdings of the Arizona Court of Appeals. As shown above, in the past decade alone criminal petitions for discretionary review have resulted in 155 published opinions by the Arizona Supreme Court. Undeniably, Rule 31.19 petitions for review are a major source of issues for the exercise of that court's discretionary jurisdiction.

In addition, Rule 111(g), Rules of the Supreme Court allows the Arizona Supreme Court to depublish an opinion that the intermediate Court of Appeals has certified for publication. However, the Arizona Supreme Court can do so only if the case is "before the [Arizona] Supreme Court" on a petition or cross-petition for discretionary review, or by special action. Certainly, the Arizona Supreme Court would not have promulgated this rule if it intended to forego the rule's jurisdictional prerequisite. This is another indication of the Arizona Supreme Court's desire to control Arizona law by exercising discretionary review.

These facts, ignored by the Ninth Circuit, demonstrate overwhelmingly that criminal petitions for discretionary review are an ordinary, integral feature of criminal appeals in this state. Under such circumstances, *O'Sullivan* requires exhaustion of discretionary review. 119 S. Ct. at 1733.

There is no meaningful distinction between Illinois' and Arizona's two-tiered appellate procedures—(1) the direct appeal to an intermediate appellate court, and (2) the right to seek discretionary review of that disposition by the state's highest court. *See* 119 S. Ct. at 1731–32

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2. Source: Arizona Supreme Court, Administrative Office of the Courts.

(describing Illinois appellate review process). Nevertheless, the central premise in the Ninth Circuit's opinion appears to be that certain language in the Arizona Supreme Court's 1989 *Sandon* opinion somehow abrogated that court's plain language in Rule 31.19 and rendered discretionary review "unavailable" and "outside the standard review process." *Swoopes v. Sublett*, 196 F.3d at 1010–11. The *Sandon* opinion did no such thing; *Sandon did not even concern a first petition for discretionary review*—the sole subject of *O'Sullivan*!

2. *What was the Arizona Supreme Court's holding in* Sandon*?*

State prisoner Mark Sandon, like many whose criminal convictions are affirmed on direct appeal in the intermediate Arizona Court of Appeals, filed through counsel a Rule 31.19 petition for discretionary review. *State v. Sandon*, 777 P.2d at 220. The Arizona Supreme Court docketed and ultimately denied Sandon's petition. *Id.* Up to that point, Sandon's circumstances were nothing out of the ordinary—most petitions for discretionary review are denied. Having had his direct appeal and having sought discretionary Arizona Supreme Court review, Sandon's appeal was "over," as far as the state courts were concerned, just as it would have been under the Illinois appellate system. *Id.*, 777 P.2d at 221.

The issue addressed in *Sandon* arose later, after the dismissal of Sandon's federal habeas petition for lack of exhaustion, when he returned to the state courts by filing additional claims in a procedurally irregular *second* (successive) Rule 31.19 petition seeking Arizona Supreme Court review. *Sandon*, 777 P.2d at 221. The Arizona Supreme Court held that Sandon's second petition was precluded due to procedural default. *Id.* In other words, the right to seek discretionary review had been available to Sandon after his direct appeal, and Sandon's attorney had taken advantage of that opportunity by filing a timely Rule 31.19 petition advancing three of Sandon's twelve original claims. What was *not* available to Sandon, nor to any other prisoner at that time (nor since), was a chance to add more claims later—claims that had been raised on direct appeal but that had not been included in the first Rule 31.19 petition. *Id.* As the *Sandon* court explained, issues decided by the court of appeals, but not included among those raised in Sandon's original petition for discretionary review, were "no longer open to substantive review in this Court, or in any other court in Arizona [unless cognizable in collateral, post-conviction relief proceedings]." *Id.* Sandon had procedurally defaulted those additional

claims by failing to advance them in the original petition for discretionary review. *Id.*

The Ninth Circuit's perception of *Sandon*'s language as a comment on the *O'Sullivan* availability question distorts both fact and law—*Sandon* is entirely inapposite because it was a successive-petition case. It did not concern the right to file an *initial* petition for discretionary review—the sole subject matter of *O'Sullivan*. As Mr. Sandon discovered, every appellant in a non-capital case has the right to submit one timely petition for discretionary review, but Rule 31.19 does not allow successive petitions. That is what *Sandon* held—nothing more.

This Court's reference to *Sandon*, in *O'Sullivan*, as an example of a state court reluctant or unwilling to accept timely original petitions for discretionary review of federal claims, was simply wrong.[3] Nothing in Arizona law, despite what *O'Sullivan* suggests, discourages the advancement of claims by way of a timely petition for discretionary review. Rule 31.19 is an available avenue of review. Every year, hundreds of Arizona prisoners take advantage of their right to pursue it.

B. THIS COURT MUST NOT ALLOW THE *SWOOPES* OPINION TO STAND.

The ramifications of the Ninth Circuit's *Swoopes* opinion are unacceptable. Out of whole cloth the Ninth Circuit has created a "bypass-the-Arizona-Supreme-Court" rule that not only violates *O'Sullivan* but will effectively deprive Arizona's highest court of its appellate jurisdiction in innumerable cases, offend the long-held doctrine of comity, and dramatically increase the number of claims that the federal habeas courts must address on the merits. Moreover, habeas petitioners undoubtedly will argue that this new rule applies retroactively because, if the fiction that the Ninth Circuit has invented is upheld, then Rule 31.19 petitions, *thousands* of which have been filed, docketed, and adjudicated in the past decade alone, supposedly have been "unavailable," and "outside the standard review process" since 1989, when the *Sandon* decision was published. By sheer judicial fiat, the Ninth Circuit has effectively written Arizona's Rule

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3. Moreover, the *O'Sullivan* exhaustion rule turns on the *availability* of the remedy of discretionary review, not on whether the caseload resulting from defendants' seeking it might be "unwelcome" in the state courts. 119 S. Ct. at 1734. Where the remedy of discretionary review is available under state law, as it clearly is in Arizona, federal law requires its exhaustion. 119 S. Ct. at 1733-34, citing 28 U.S.C. § 2254(c).

of Criminal Procedure 31.19 out of existence for federal exhaustion purposes.

The trouble would not end there. While some future federal habeas petitioners would forego any state court litigation beyond the Arizona Court of Appeals and go directly to federal court, many could be expected to avail themselves of all the alternative avenues of appeal, which means they would very likely generate chaotic parallel state and federal litigation by seeking Arizona Supreme Court discretionary review and federal habeas review simultaneously.

Not only would parallel litigation potentially render the federal action a complete waste of time if relief were granted by the Arizona Supreme Court. Prisoners who file one federal habeas action directly after finding no relief in the Arizona Court of Appeals may attempt to file another habeas after being denied relief on a Rule 31.19 petition, because, according to the *Swoopes* panel's reasoning, a Rule 31.19 petition for review, being "outside the standard review process," might be regarded as a separate action under state law—something akin to collateral proceedings rather than part of the direct appeal.

Also, consider the effect, under such circumstances, of a belated plain-statement ruling by the Arizona Supreme Court that a claim was procedurally defaulted in the trial court. Should a federal habeas court, having already addressed that same claim on the merits for lack of a finding of procedural default in the Arizona Court of Appeals, revisit the judgement and find the claim precluded from federal review after all? The implications of the Ninth Circuit's opinion raise serious questions as to whether future federal habeas proceedings in the District of Arizona can be conducted in any orderly manner.

The ensuing dramatic drain on federal judicial resources is easy to foresee—all because of the misreading of an Arizona opinion—*Sandon*—that had nothing to do with the subject matter of *O'Sullivan*. This Court should remedy the chaos that *Swoopes* portends by granting review, vacating the Ninth Circuit's opinion, and making clear that seeking discretionary review by the Arizona Supreme Court is necessary in order to exhaust claims before presenting them in § 2254 federal habeas litigation in the District of Arizona.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL W. SWOOPES, PETITIONER-APPELLANT, -vs- SAM SUBLETT; GRANT WOODS, Attorney General RESPONDENTS-APPELLEES.	NO. 94-16033 D.C. NO. CV-93-00471-JMR OPINION

On Remand from the United States Supreme Court

Filed November 2, 1999

Before: Procter Hug, Jr., Chief Judge, Ferdinand F. Fernandez and Sidney R. Thomas, Circuit Judges.

Per Curiam Opinion

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. On remand from the United States Supreme Court, the court held that, except in capital cases, or those involving the imposition of a life sentence, Arizona state prisoners need not appeal from an Arizona Court of Appeals' denial

of postconviction relief to the Arizona Supreme Court in order to exhaust their state remedies for purposes of federal habeas corpus.

Appellant Samuel Swoopes was convicted in Arizona state court of armed robbery, kidnapping, and related crimes. The Arizona Court of Appeals denied postconviction relief. Swoopes had asserted certain constitutional claims before the Arizona Court of Appeals, but failed to raise them when he unsuccessfully sought discretionary review by the Arizona Supreme Court. Swoopes turned to federal court for habeas corpus relief.

The district court concluded that all but one of Swoopes' claims were procedurally barred because he failed to exhaust his state remedies, and Arizona procedural rules precluded further state remedies for the unexhausted claims. The court also determined that there was no state remedy for the unexhausted claims, and that any attempt to exhaust them would be futile. As to the remaining claim, the court rejected it on the merits.

The court of appeals affirmed. The United States Supreme Court granted Swoopes' certiorari petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of *O'Sullivan v. Boerckel,* 119 S.Ct. 1728 (1999).

O'Sullivan held that to satisfy the exhaustion requirement for federal habeas relief, state prisoners must file for discretionary review in a state supreme court when that procedure is part of ordinary appellate review. However, the court acknowledged an exception to the exhaustion requirement relating to any specific remedy that the state has provided is "unavailable." The Court also stated that without more, the creation of a discretionary review system does not make review in a state supreme court "unavailable."

In three cases decided in 1984, 1989, and 1998, the Arizona Supreme Court stated that in cases other than those carrying a life sentence or the death penalty, a decision by the Arizona Court of Appeals exhausts a defendant's state remedies.

[1] Under the Arizona Constitution, a criminal defendant has the right to appeal in all cases. By Arizona statute, that right is generally limited to appeal to the Arizona Court of Appeals; there is no right of appeal to the

Arizona Supreme Court except in capital cases, or when a life sentence is imposed. Except in life sentence or capital cases, the Arizona Supreme Court is vested with discretion as to whether a request for review will be entertained.

[2] Although review before the Arizona Supreme Court is discretionary, it is "available" under *O'Sullivan*; thus, at least facially, Arizona prisoners are not relieved of their duty to file an appeal with that court. However, the question was whether Arizona has identified discretionary Supreme Court review as outside the standard review process, and has plainly said that it need not be sought for the purpose of exhaustion.

[3] The Arizona Supreme Court has announced that, in cases not carrying a life sentence or the death penalty, review need not be sought before the Arizona Supreme Court in order to exhaust state remedies. Thus, post-conviction relief before the Arizona Supreme Court is a remedy that is "unavailable" within the meaning of *O'Sullivan*.

[4] *O'Sullivan* requires that before a state prisoner files a federal habeas petition, he or she must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process. Arizona has declared that its "complete round" does not include discretionary review before the Arizona Supreme Court. [5] Thus, except in petitions in life-sentence or capital cases, claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.

[6] Because Swoopes was not required to file a petition for review before the Arizona Supreme Court to exhaust his claims for federal habeas purposes, the court of appeals had to reverse the judgment of the district court and remand for further proceedings.

COUNSEL

Javier Chon-Lopez, Assistant Federal Public Defender, Tucson, Arizona, for the petitioner.

Eric J. Olsson, Assistant Attorney General, Tucson, Arizona, for the respondents.

OPINION

PER CURIAM:

We consider this appeal on remand from the Supreme Court for further consideration in light of *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), decided after issuance of our prior decision in this case. After reconsideration, we conclude that Arizona state prisoners need not appeal an Arizona Court of Appeals' denial of post-conviction relief to the Arizona Supreme Court in order to exhaust their state remedies for federal habeas corpus purposes, except in capital cases or cases involving the imposition of a life sentence.

I

Samuel Swoopes, an Arizona state prisoner, appealed the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] The district court concluded that all but one of Swoopes's claims were procedurally barred because Swoopes had not exhausted his state remedies and Arizona state procedural rules precluded further state remedies for the unexhausted claims. A variety of exhaustion infirmities were identified by the district court:

> Claims two and five were raised in Swoopes's Rule 32 petition, but not appealed to the Arizona Supreme Court; claims three and four were raised in Swoopes's supplemental opening brief in the Arizona Supreme Court, but not urged before the Arizona Court of Appeals as required. Claim six was not advanced either on direct appeal or by way of collateral attack.

1. Swoopes was convicted of three counts of armed robbery, three counts of kidnapping, one count of first-degree burglary, one count of sexual assault, and one count of aggravated robbery. Certain eyewitness identification testimony formed virtually the entire basis for Swoopes's conviction. In his federal habeas petition Swoopes raised six issues: the eyewitness in-court identifications were tainted by improper pretrial identification procedures; the use of false and perjured grand jury testimony; introduction of evidence regarding the place of initial witness identification amounting to improper bad act evidence; prosecutorial misconduct; ineffective assistance of counsel at trial, on direct appeal, and at his state post conviction hearing; and violation of the Double Jeopardy Clause.

The district court also concluded that Swoopes had no available state remedy for any of his unexhausted claims. Accordingly, the court held that all of Swoopes's unexhausted claims were procedurally barred under Arizona law and any attempt to exhaust the claims would be futile. The district court then rejected the remaining claim, unduly suggestive pre-trial identification procedures, on the merits.

We affirmed the district court in all respects in an unpublished memorandum disposition. *See Swoopes v. Sublett*, No. 94-16033 (9th Cir. Sept. 3, 1998). The United States Supreme Court granted Swoopes' petition for certiorari, vacated the judgment, and remanded the case to us for further consideration in light of *O'Sullivan*. *See Swoopes v. Sublett*, 1999 WL 381061 (U.S.).

II

[1] The primary question raised as we apply *O'Sullivan* to this appeal is whether an Arizona state prisoner is required to seek discretionary post-conviction review with the Arizona Supreme Court in order to exhaust state remedies for purposes of federal habeas. Under the Arizona Constitution, a criminal defendant has "the right to appeal in all cases." Ariz. Const., art. 2, § 24. By Arizona statute, that right is generally limited to appeal to the Arizona Court of Appeals; there is no right of appeal to the Arizona Supreme Court except in capital cases or when a life sentence is imposed. *See* Ariz. Rev. State. §§ 12-120.21(A)(1); 12-120.24; 13-4031; *see also* Ariz. R. Crim. P. 31. Rather, except in life sentence or capital cases, the Arizona Supreme Court is vested with discretion as to whether a request for appellate review will be entertained. *See* Ariz. Rev. Stat. § 12-120.24.

In *O'Sullivan*, the Supreme Court held that, in order to satisfy the exhaustion requirement for federal habeas relief, state prisoners must file for discretionary review in a state supreme court when that review is part of ordinary appellate review. *See* 119 S. Ct. at 1733. However, in doing so, the Court also acknowledged an exception to the exhaustion requirement relating to any specific state remedy when a State has provided that that remedy is unavailable." *Id.* at 1734. In setting forth this exception, the Court was clear that "the creation of a discretionary review system does not, *without more*, make review" in a state supreme court "unavailable." *Id.* (emphasis added). In a concurring opinion, Justice Souter construed this to mean a discretionary procedure that a

> state court has occasionally employed to provide relief, so long as the state has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion.

Id. at 1735.

[2] Although review before the Arizona Supreme Court is discretionary, it is "available" under *O'Sullivan*; thus, at least facially, Arizona prisoners are not relieved of their duty to file an appeal with that court. However, the question is whether Arizona has identified discretionary Supreme Court review "as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.* It plainly has.

In *State v. Shattuck*, 684 P.2d 154 (Ariz. 1984) the Arizona Supreme Court stated that "[i]n cases other than those carrying a life sentence or the death penalty, a decision by the court of appeals . . . exhausts a defendant's right of appeal in this jurisdiction." *Id.* at 157. While *Shattuck* did not address the exhaustion of state post-conviction relief for purposes of later filing a federal habeas petition, its reasoning was later applied to just that situation.

In *State v. Sandon*, 777 P.2d 220 (Ariz. 1989), the Arizona Supreme Court was confronted with several prisoner's petitions for state post-conviction relief after a federal district court had dismissed their federal habeas petitions for failure to exhaust state remedies. In response to this, the Arizona Supreme Court again reiterated that it is a court of discretionary review and imported the reasoning of *Shattuck* by holding that "'[o]nce the defendant has been given the appeal to which he has a right, state remedies have been exhausted.'" *State v. Sandon*, 777 P.2d at 221 (quoting *State v. Shattuck*, 684 P.2d 154, 157 (Ariz. 1984)).

In *Moreno v. Gonzalez*, 926 P.2d 205 (Ariz. 1998), the Arizona Supreme Court considered certified questions from us, and reiterated that a petition for review from the Arizona Court of Appeals is not part of a defendant's right to appeal. *Id.* at 207-08.

[3] In sum, the Arizona Supreme Court has announced that, in cases not carrying a life sentence or the death penalty, review need not be sought before the Arizona Supreme Court in order to exhaust state remedies.

Thus, post-conviction review before the Arizona Supreme Court is a remedy that is "unavailable" within the meaning of *O'Sullivan*.[2]

[4] *O'Sullivan* requires that before a state prisoner files a federal habeas petition, he or she must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." 119 S. Ct. at 1732. Arizona has declared that its "complete round" does not include discretionary review before the Arizona Supreme Court. *See Moreno*, 962 P.2d at 207-08.

[5] Recognizing that "each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference," *see Nino v. Galaza*, 183 F.3d 1003, 1007 (9th Cir. 1999), we must credit Arizona's choice. Thus, except in habeas petitions in life-sentence or capital cases, claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.

III

This is not the first occasion we have visited the question of proper exhaustion of Arizona state remedies. Despite the Arizona Supreme Court's disclaimers in *Shattuck* and *Sandon*, we have previously held that the exhaustion doctrine is a matter of federal law and that a state prisoner was required to seek discretionary review before the Arizona Supreme court to exhaust state remedies. *See Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) ("The Arizona Supreme Court has confused review as of right under state law with "the right under the law of the state to raise' an issue within the meaning of the federal habeas statute"); *see also Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1991).

Ironically, that philosophy is the primary thrust of *O'Sullivan*, which requires exhaustion of all discretionary avenues of state relief as a

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2. We are not unmindful that the Supreme Court cited *Sandon* for the proposition that some state courts "do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." *O'Sullivan*, 119 S. Ct. at 1734-35. The State argues that this statement was in dictum and that the Supreme Court was "utterly wrong about Arizona law." However, a careful review of *Sandon* and *Shattuck* support the Supreme Court's view.

prerequisite for filing a federal habeas corpus petition. *See* 110 S. Ct. at 1734. Thus, to the extent that *Jennison* announced that the creation of a state discretionary review system does not itself make a remedy unavailable under federal habeas law, it is fully in accord with *O'Sullivan*.

However, *O'Sullivan* recast the manner by which we must ascertain whether state appellate procedures are "available" for exhaustion purposes. The import of *O'Sullivan* is that exhaustion is not required when a state declares which remedies are "available" for exhaustion. Arizona has done so. Therefore, *O'Sullivan* implicitly overruled that portion of *Jennison* that rejected *Shattuck* and *Sandon*, and held that Arizona state prisoners must seek review by the Arizona Supreme Court to exhaust state remedies for purposes of federal habeas.

IV

[6] Because Swoopes was not required to file a petition for review before the Arizona Supreme Court to exhaust his claims for federal habeas purposes, we must reverse the judgment of the district court and remand for further proceedings. On remand, the district will determine which claims were properly exhausted, and not procedurally barred, and issue a decision on the merits of those claims.

REVERSED AND REMANDED

APPENDIX B

161 Ariz. 157

STATE of Arizona, Appellee,

v.

Mark L. SANDON, Russell Young, Danny Lynn Hudson, and Gerald Title Jones, Appellants.

No. CR-86-0116-PR.

Supreme Court of Arizona,
En Banc.

July 20, 1989.

Defendant and several other prison inmates were convicted before the Superior Court, Pima County, Robert B. Buchanan, J., of either conspiracy to commit, or actual commission of, the offense of introducing firearms into a state prison, or of both such offenses. Appeals were perfected and petitions for postconviction relief were filed in the trial court. When relief was denied in postconviction proceedings, petitions for review were consolidated with the direct appeals. The Court of Appeals, reviewed 13 issues in the consolidated cases, 12 of which applied to defendant, affirmed the convictions, and denied the petitions for review. Defendant filed petition for review, selecting three issues. The Supreme Court denied the petition. Defendant then sought habeas corpus relief in federal district court, which determined that he had not exhausted his state court remedies on the eight issues he had not presented to the Supreme Court. After dismissal of federal habeas petition, defendant again petitioned for review. The Supreme Court held that state remedies were exhausted with respect to issues decided by the Court of Appeals, even though they had not been presented to the Supreme Court.

Petition dismissed.

Habeas Corpus 366

For purposes of federal habeas petition, petitioner exhausted his state remedies with respect to issues decided by the Court of Appeals, even though issues were not subsequently presented to the Supreme Court in a petition for review. 28 U.S.C.A. § 2254; 17 A.R.S. Rules Crim.Proc., Rule 31.19.

Robert K. Corbin, Atty. Gen. by Jessica Gifford Funkhouser and Barbara A. Jarrett, Asst. Attys. Gen., Phoenix, for appellee.

D. Jesse Smith, Tucson, for appellant Sandon.

Mark L. Sandon, Florence, pro se.

PER CURIAM.

We would ordinarily dispose of this matter by order. But, because the Court continues to receive large numbers of prisoner petitions seeking to exhaust state remedies, *see, e.g., Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), we briefly address that issue based upon the procedural history of the case of *State of Arizona v. Mark L. Sandon*, Pima County No. CR-006801 SGJ.

Sandon and several other prison inmates, after a twelve-week jury trial, were convicted of either conspiracy to commit, or the actual commission of, the offense of introducing firearms into the Arizona State Prison at Florence, or of both such offenses. Appeals were perfected to the Court of Appeals and petitions for post-conviction relief were filed in the trial court. When relief was denied in the post-conviction proceedings, the petitions for review were consolidated with the direct appeals.

The Court of Appeals reviewed 13 issues in the consolidated cases, 12 of which applied to Sandon, affirmed the convictions, and denied the petitions for review in an 8-page memorandum decision, *State v. Sandon*,

Nos. 2 CA-CR 3076 and 2 CA-CR 3677-2 PR (Ariz.Ct.App. Jan. 15, 1986).

Following this decision, counsel for Sandon filed a petition for review in this Court, selecting three issues that he believed merited our consideration, and that were most likely to result in a grant of review under the criteria set out in Rule 31.19, Ariz.R.Crim.P., 17 A.R.S. (hereafter Rule _____). We denied the petition for review by order on May 28, 1986.

Sandon then sought habeas corpus relief in the federal district court pursuant to 28 U.S.C. § 2254. After the federal court determined that Sandon had not exhausted his state court remedies on 8 issues counsel had not presented to this Court in Sandon's petition for review, Sandon's federal habeas petition was dismissed without prejudice. This petition followed.

In Arizona, every person convicted of a criminal offense has the absolute right to an appeal. That right was considered so fundamental by the framers of our constitution that it was included in the same section covering such basic rights as the right to counsel, the right to compulsory process, the right to have all the other rights without being compelled to advance money or fees to secure them, and several others. Ariz.Const. art. 2 § 24.

In addition to this guaranteed direct appeal, any person who has been convicted of, or sentenced for, a criminal offense in this state may institute a post-conviction proceeding pursuant to Rule 32 to secure relief on the grounds set out in the rules, without payment of any fee, and with an absolute right to be represented by counsel, appointed or retained, in the first of such petitions. *See also* Comment to Rule 32.1.

In *State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154 (1984), we pointed out that there was no right to appeal to this Court except in cases in which the death penalty or life imprisonment is imposed. A.R.S. § 12-120.21(A)(1).[1] While *Shattuck* involved a discussion of the role of counsel in cases appealed according to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the considerations are the same

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1. A.R.S. § 12-120.21(A)(1) was recently amended, deleting the words "or life imprisonment," giving jurisdiction of direct appeal in those cases to the Court of Appeals. 1989 Ariz.Sess. Laws, Ch. 58.

when discretionary review is sought in this Court pursuant to Rule 31.19. "Once the defendant has been given the appeal to which he has a right, state remedies have been exhausted." *Shattuck*, 140 Ariz. at 585, 684 P.2d at 157. Not only is this Court not "required to accept petitions for review in *Anders* type cases," *id.*, we are not *required* to accept them in any case. *Id.* at 584, 684 P.2d at 156.

When counsel, whether retained or appointed, has followed the procedures as outlined above, as counsel for Sandon did in this matter, the case in the Arizona courts is over. The issues decided by the Court of Appeals, even though they had not been presented to this Court in a petition for review, are no longer open to substantive review in this Court, or in any other court in Arizona, absent proper allegations pursuant to Rule 32.1(d), (e) or (g)[2] which allegations are not made in this petition and do not appear of record. Rule 32.2.

State remedies have been exhausted. The petition is dismissed.

GORDON, C.J., FELDMAN, V.C.J., and CAMERON and MOELLER, JJ., concur.

CORCORAN, J., did not participate in the determination of this matter.

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2. "Rule 21.1. Scope of Remedy

* * * * * * *

d. He is being held in custody after his sentence has expired;

e. Newly-discovered material facts exist, which the court, after considering

(1) The probability that such facts, if introduced would have changed the verdict, finding or sentencing;

(2) The diligence which would have been required to discover and produce the evidence at trial;

(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts, may require that the conviction or sentence be vacated;

* * * * * * *

g. There has been a significant change in the law applied in the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard."

APPENDIX C

FILED
Dec 17, 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL W. SWOOPES, PETITIONER-/APPELLANT, -VS- SAM SUBLETT; GRANT WOODS, Attorney General RESPONDENTS-APPELLEES.	NO. 94-16033 D.C. NO. CV-93-00471-JMR ORDER

Before: HUG, Chief Judge, FERNANDEZ and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

207B

Division 1
Court of Appeals
State of Arizona
Filed Aug 02 1999
GLEN D. CLARK, CLERK

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 97-0458-PR
	)	
Respondent,	)	DEPARTMENT D
	)	
v.	)	MARICOPA County
	)	Superior Court
SCOTT ALAN STEPHENS,	)	No. CR 87-01066
	)	
Petitioner.	)	ORDER
	)	

The court has considered respondent's motion for reconsideration of this court's order dated June 25, 1999. Relying on *O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S. Ct. 1728 (1999), this court entered an order denying petitioner's motion to file a delayed petition for review to the Arizona Supreme Court as unnecessary. Respondent has filed a motion for reconsideration and pointed out that certain language in the *O'Sullivan* opinion may be misleading. Since *Jennison v. Goldsmith*, 940 F.2d 1308 (9th Cir. 1991), the law has been that a defendant must exhaust all state court remedies, including discretionary review by the Arizona Supreme Court, to avoid a procedural bar to federal habeas proceedings. While the

Arizona Supreme Court may accept *Boerckel's*, invitation to declare its discretionary review procedure as outside the standard review process, it has not yet done so. For these reasons and the reasons stated in the motion for reconsideration,

IT IS ORDERED granting the motion for reconsideration and vacating this court's order dated June 25, 1999.

IT IS FURTHER ORDERED granting petitioner's motion to file a delayed petition for review to the Arizona Supreme Court. Any petition shall be filed on or before September 10, 1999.

DATED this 2nd day of August, 1999.

RUDOLPH J. GERBER
PRESIDING JUDGE

APPENDIX E

ARIZONA SUPREME COURT STATISTICS:
PETITIONS FOR DISCRETIONARY REVIEW

YEAR	NUMBER FILED	DISPOSED OF BY:	ORDER	OPINION	MEMO DECISION
1999*	450		506	5	1
1998	584		451	14	3
1997	583		626	15	2
1996	662		613	15	6
1995	484		474	8	3
1994	481		488	10	1
1993	550		521	12	1
1992	430		346	19	1
1991	349		306	17	8
1990	310		246	19	0
1989	290		260	21	17
SUBTOTALS 1989-1999: CRIMINAL	5,173		4,837	155	43
1988**	775		596	49	3
1987	756		707	72	10
1986	805		686	85	9

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* January 1 through July 1, 1999, only. Statistics for all other years represent the entire year.

** The numbers for 1986 through 1988 represent both criminal and civil cases, because separate breakouts are not available. Statistics for all other years represent only criminal cases.